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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 248

CENTRAL PACKING COMPANY, INC.,
Petitioner,

vs.

RYDER TRUCK RENTAL, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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INDEX

Opinions Below 1
Jurisdiction 2
Questions Presented 2
Constitutional Provision Involved 2
Statement of the Case 3
Reasons for Granting the Writ 4
Summary 10
Conclusion 11
Proof of Service 11
Appendix A1
Opinion of Court Below A1
Judgment A8
Order Denying Appellee's Petition for Rehearing A9
Truck Lease and Service Agreement A10

TABLE OF CASES

Calmar Steamship Corp. v. *Scott*, 345 U.S. 427 (1952) 7
Express Cases, 117 U.S. 1, *mod. in other respects*, 117 U.S. 601 (1886) 7
Greene County v. *Quinlan*, 211 U.S. 582 (1909) 7
Hudson Canal Co. v. *Penna. Coal Co.*, 75 U.S. (8 Wall.) 276 (1869) 6

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RYDER TRUCK RENTAL, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner Central Packing Company, Inc. respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, which by a divided court reversed a judgment of the United States District Court for the District of Kansas. The District Court judgment had been entered in favor of Petitioner directing a verdict against Respondent at the close of Respondent's evidence.

OPINIONS BELOW

The opinion of the District Court was made orally and is set out in the record (R. 232, 233).

The opinion of the Tenth Circuit Court of Appeals and dissent thereto appears in the Appendix hereto, post, pages A1 to A8, and is reported in 341 F.2d 321.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on January 28, 1965, and appears in the Appendix hereto, at page A8. A timely petition for rehearing was denied on March 17, 1965, which denial appears in Appendix B hereto, at page A9. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

1. Did the Tenth Circuit Court of Appeals in reversing the District Court deprive Petitioner of its right to trial by jury of the factual issue of the breach of the Lease in suit, as guaranteed by the Seventh Amendment to the Constitution of the United States?

2. Did the Tenth Circuit Court of Appeals in reversing the District Court on the legal issue of whether or not there was a requirement of use under the Lease, apply the doctrine or process of "contractual implication" in a manner contrary to the settled rulings and pronouncements of this Court, and accomplish a result contrary to the terms of the Lease and the intention of the parties?

CONSTITUTIONAL PROVISION INVOLVED

The Tenth Circuit Court of Appeals by reversing the District Court and remanding the case for trial as to *remedies only* deprived Petitioner of its right to trial by jury on the issue of breach of the Lease in suit. This ruling

deprived Petitoner of its right to trial by jury secured by the Seventh Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

This action was brought by Respondent for the alleged breach of a Truck Lease and Service Agreement (the "Lease") (R. 77, Exhibit Booklet, Exhibit A to Petition, Appendix p. A10).

The case went to trial before a jury in the United States District Court for the District of Kansas on a pretrial order providing for trial by jury (R. 96). Timely demand for trial by jury had been made by Petitioner but was not incorporated in the record since no issue involving the deprivation of this right arose until the majority opinion of the Tenth Circuit Court of Appeals was issued.

A jury was impaneled and sworn (R. 105), and after it heard the Respondent's evidence, the Court sustained Petitioner's motion for a directed verdict as to Counts I and II on the ground that the Lease contained no minimum requirement of use provision with respect to the leased equipment, and accordingly there was no breach by Petitioner.

The jury was discharged and judgment was entered dismissing Counts I and II and it therefore became unnecessary for Petitioner to present its case. Judgment was entered in Respondent's favor on Count III. Count III is not in dispute.

The issue of law before the District Court was whether the language in the Lease that the equipment be used and operated in the "normal and ordinary conduct of business" pertained to "manner of use" only, or imposed a requirement of use or minimum use on Petitioner and its assignees

and sublessees. The District Court found that the Lease contained no requirement of use or minimum use. Accordingly, no consideration was given, no evidence was heard and no jury verdict was reached as to whether a breach would, in fact, have occurred if the clause "normal and ordinary conduct of business" had been interpreted so as to require use or minimum use of the leased equipment.

The majority opinion in reversing the District Court concluded that "normal and ordinary conduct of business" imposed a requirement of use. It went on to hold, as if it did not remain an issue of fact to be passed upon by a jury, that Petitioner had not fulfilled this requirement. The case was therefore remanded for trial on the sole issue of remedies afforded in the Lease. Petitioner contends that by so doing the Tenth Circuit deprived Petitioner of its right to trial by jury on the factual issue as to whether Petitioner did in fact breach the Lease.

REASONS FOR GRANTING THE WRIT

I.

The majority opinion seized upon Petitioner's stipulation of fact (R. 97) in the District Court that it had not made shipments in the motor vehicle equipment after February 13, 1960, to justify its finding of a breach of the Lease as a matter of law. This conclusion was unwarranted since there was no stipulation of fact of any kind as to whether or not the normal and ordinary conduct of Petitioner's business at any particular time was such as to require use. Since a verdict was directed before Petitioner was afforded an opportunity to offer evidence showing that the normal and ordinary conduct of the business did not require use of the leased equipment, this issue should have remained as a question of fact for the jury

to resolve on remand. The majority opinion (Appendix p. A6, 341 F.2d at 324) in bypassing this recognized procedure effectively deprived Petitioner of a trial by jury on the crucial factual issue of whether or not the non-use of the equipment was justified as being consonant with Petitioner's normal and ordinary conduct of business and thus not a breach of the Lease.

It was unnecessary and improper for the majority to conclude that because Petitioner was required to use the equipment in the normal and ordinary conduct of its business, non-use automatically constituted a breach. To illustrate, assume that at the time of the alleged breach all of Petitioner's customers had specified shipment of their purchases by rail, or assume that all shipments at that particular time were to be to locations where rail rates would have been more economical than the rates specified in the Lease. To take a further illustration, assume that the nature of Petitioner's business at the time of the alleged breach and thereafter had so changed that no rolling equipment of any kind was required in its "normal and ordinary" conduct. Under such circumstances, economics or sound business practices, or the "normal and ordinary" conduct of Petitioner's business, would indeed not dictate shipment by means of the leased equipment. These are fact questions for a jury to determine from evidence heretofore not submitted on the question of what was the nature of Petitioner's business and what was the "normal and ordinary" conduct thereof.

We submit that it was improper and erroneous for the Tenth Circuit to have concluded, as a matter of law, that Petitioner had breached the Lease on the basis of a stipulation of only one of many facts necessary to be determined before such a conclusion could be made. Therefore, when the majority sent the case back to the District

Court "for further trial on the remedies provided in the Lease for its breach" (Appendix p. A6, 341 F.2d at 324) it deprived Petitioner of its right to a trial by jury of the issue as to whether there had in fact been a breach of the Lease. This was clearly contrary to the guarantee of trial by jury as provided for in the Seventh Amendment to the Constitution of the United States.

II.

The issue of law before the District Court was whether the Lease in question, and in particular the language therein requiring Petitioner to use and operate the leased equipment in the "normal and ordinary conduct of business", dealt solely with the manner or method of using the equipment or imposed a requirement of use, and defined a standard of use. The District Judge ruled that the Lease did not impose a requirement of use or define a standard of use (R. 232, 233). Although the majority opinion concluded that a requirement of use was implicit in the Lease, the dissenting Circuit Judge would have affirmed the District Judge, concluding that "normal and ordinary conduct of business," was such a general provision that "in the face of the free right to assign and sublease, [it] has no meaning" (Appendix p. A7, 341 F.2d at 325).

We submit that the majority opinion, under the guise of applying the doctrine of contractual implication, imposes an obligation upon the Petitioner which is contradictory to the express language of the Lease and which the parties did not contemplate or intend. Such an application of this doctrine has long been condemned by the settled rulings and pronouncements of this Court. *Hudson Canal Co.* v. *Penna. Coal Co.*, 75 U.S. (8 Wall.) 276, 288-290 (1869) (a covenant to send all of defendant's coal marketed via railroad over plaintiff's canal

would not be implied where no covenant existed in written agreement from which such implication could be made); *Express Cases*, 117 U.S. 1, 28-29 (1886), *mod. in other respects*, 117 U.S. 601 (1886) (a covenant on the part of railroad companies to continue to furnish space to express companies on trains would not be implied where agreement furnished no basis for implication); *Greene County* v. *Quinlan*, 211 U.S. 582, 596 (1909) (while it would have been much wiser for political subdivision to secure additional protection for itself in issuance of bonds, additional covenant would not be implied, court stating that courts cannot make better agreements for parties than parties have made); *Calmar Steamship Corp.* v. *Scott*, 345 U.S. 427, 435 (1952) (implication of the covenants and the contractual interpretation sought in a marine insurance policy would amount to reformation of the policy, a remedy for which the requirements had not been met).

The determination of the foregoing legal issue is far more significant than merely a technical interpretation of the Lease in question. It presents this Court with a significant opportunity to carefully examine its prior position in placing reasonable restrictions and limits on the power of lower courts to impose obligations upon contracting parties by utilizing the doctrine or process of contractual implication. As such, a review of this case could have far reaching effect upon commercial agreements and transactions.

The majority opinion recognizes that the clause in the Lease requiring use of the leased equipment in the "normal and ordinary conduct of business" was a provision "obviously designed to cover every conceivable contingency with respect to the *manner of operation* of the equipment" (Appendix p. A6, 341 F.2d at 324, emphasis added). It then extended the coverage of this provision to encompass a requirement of use (Appendix p. A6, 341 F.2d at

324). This extension had no foundation in the language of the Lease itself since the only obligations imposed upon Petitioner in paragraph 4 (R. 11, Appendix pp. A15-A17) where the clause "normal and ordinary conduct" appears, relates solely to the *method* or *manner* of operating the leased equipment. Moreover, a requirement of use or minimum use could not have been reasonably implied from the Lease as a whole since such an implication is inconsistent with Petitioner's absolute right of assignment set forth in paragraph 5D of the Lease (R. 13, Appendix p. A19).* Under the majority opinion this right of assignment becomes meaningless since the "normal and ordinary conduct" applicable to a meat packer such as Petitioner is totally different from the "normal and ordinary conduct" of an assignee engaged in an unrelated business but yet requiring refrigerated equipment.

Even if it could be contended that a requirement of use could be implied under the Lease, however, the majority opinion erroneously assumes that there is a meaningful or workable *standard of use* in the Lease. The Lease contains no standard of use based on a fixed charge per week and the majority opinion recognizes that it was "the deliberate purpose of the parties not to specify a minimum mileage requirement" (Appendix p. A6, 341 F.2d at 324). It is also clear that the parties did not intend that "normal and ordinary" use of the equipment was to be ascertained during a particular time period after the Lease was entered into, *e.g.*, one month,

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*In point of fact, the Lease was assigned to Central Packing of Kansas, Inc., an entity wholly unrelated to Petitioner, and Petitioner ceased active operations immediately thereafter. Non-use by the assignee was the basis on which Respondent terminated the Lease (R. 237) and brought this action. The assignee, now bankrupt, entered into a separate lease with Respondent containing minimum use requirements (R. 40).

three months, six months, one year or two years. Had this been the intention, it would have been simple enough to have so provided in the Lease itself. Apparently, the parties concluded that any such arbitrary time period would not present an accurate picture of "normal and ordinary" use of the equipment for the purpose of a minimum rent or mileage requirement. As a result of these deliberate omissions the Lease itself gives no basis whatever for the determination of damages in the event of non-use of the equipment. Consequently, as the Lease was written, the concept of "normal and ordinary" use as a determinate of required use can have meaning only in relation to the business Petitioner was actually conducting during the entire term of the Lease.

The failure to supply a meaningful standard of use would have been a critical deficiency even if an absolute right of assignment was not an integral part of the Lease. Once the right of assignment is exercised (as it was), however, and Petitioner is no longer using the equipment, any attempt to determine the extent of the use Petitioner *would* be making of the equipment *if* it were operating the equipment in its business at some future date becomes the purest form of speculation. The only alternative to this fruitless form of speculation, however, would be to apply as a standard of required use the "normal and ordinary" use of the equipment in the conduct of business of any assignee of Petitioner. As pointed out in the dissenting opinion and as implicitly recognized in the majority opinion, however, this approach is likewise ineffectual since the "extent of use can change without limit depending upon the nature of the assignee's or sublessee's business, and this leaves the Court without any measure or standard to determine damages in the event of a breach" (Appendix pp. A7-A8, 341 F.2d at 325).

Petitioner submits that the majority opinion, under the guise of contractual implication, has the effect of writing an agreement between the parties and imposing obligations which were neither contemplated nor intended. It has the further effect of imposing these obligations without any reasonable method or basis for determining the necessary limits or standards with respect thereto. Since similar applications of the doctrine or process of contractual implication have been repeatedly condemned by this Court, and since the use of this process by courts has a broad effect on commercial transactions generally, we ask that the judgment of the Tenth Circuit Court of Appeals be reviewed on this issue.

SUMMARY

1. The majority ruling of the Tenth Circuit Court of Appeals, in reversing the District Court and remanding the case for trial on the issue of remedies alone, deprives Petitioner of its constitutional right to a trial by jury of the question as to whether or not it did in fact breach the Lease in suit.

2. The majority ruling of the Tenth Circuit Court of Appeals, in reversing the District Court on the legal issue of whether or not there was required use of equipment under the Lease, applied the doctrine or process of "contractual implication" in a manner contrary to controlling decisions of this Court, and accomplished a result contrary to the intentions of the parties.

CONCLUSION

For the reasons advanced above, a writ of certiorari should be granted.

Respectfully submitted,

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PROOF OF SERVICE

I, Edward A. Smith, one of the attorneys of record for Central Packing Company, Inc., Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on June 10, 1965, I served a copy of the foregoing Petition for a Writ of Certiorari to the Supreme Court of the United States, on Respondent by mailing a true copy thereof to Russell W. Baker, Watson, Ess, Marshall & Enggas, Counsel of record for Respondent, at 1500 Home Savings Building, 10th and Grand Avenue, Kansas City, Missouri.

Edward A. Smith

EDWARD A. SMITH
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Kansas City, Missouri

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

NOVEMBER TERM—1964

RYDER TRUCK RENTAL, INC.,
Appellant,

vs.

CENTRAL PACKING COMPANY, INC.,
Appellee.

No. 7713

Appeal from the United States District Court for the District of Kansas

(Filed United States Court of Appeals, Tenth Circuit, January 28, 1965. Robert D. Cartwright, Clerk.)

Russell W. Baker (Robert H. Bingham, Douglas Stripp, and James F. Duncan with him on Brief), for Appellant.

George Schwegler, Jr. (Edward A. Smith, Wayne F. Caskey, Jr. and James J. Lysaught with him on Brief), for Appellee.

Before MURRAH, Chief Judge, and PICKETT and SETH, Circuit Judges.

MURRAH, Chief Judge.

This is an appeal from a judgment on a directed verdict, in a suit by appellant-Ryder Truck Rental, Inc. to recover damages for the breach of a refrigerated-truck lease-contract with appellee-Central Packing Company, Inc.

Ryder is engaged in the business of leasing refrigerated equipment on a mileage basis. Central is in the meat packing business and used refrigerated equipment in the transportation of its products. Under the terms of the subject lease-contract, Ryder leased thirty new diesel refrigerated truck-trailers to Central for a period of six and one-half years, with the right of continuous use. Central was granted the further right to sublease any of the vehicles or assign its interest in the lease; provided, however, that "in the event of such sublease or assignment the Lessee shall remain liable for the performance of all of its obligations hereunder." See: Paragraph 5-D. Each vehicle carried Central's name in porcelain enameled letters, with its designated trade symbol. Ryder warranted that the equipment would be mechanically fit and properly equipped at all times to safely transport fresh meat and perishable commodities. Ryder was to be paid for the use of the equipment under a sliding scale mileage rate, based upon the number of miles over which each piece of equipment was used. The lease did not specify any minimum mileage use requirement, but the lessee did expressly agree to "use and operate the motor vehicle equipment * * * in the normal and ordinary conduct of its business, including but not limited to renting, leasing or subleasing said vehicles to others * * *." See: Paragraph 4-I. Central was given the right to terminate the lease and purchase the leased equipment, in accordance with a stipulated formula. In the event of cancellation for Central's default, Central agreed, at Ryder's option, to purchase the leased equipment in accordance with the same formula.

After using the trucks, apparently on a mutually satisfactory basis, for approximately six months, Central assigned the lease to Central Packing Company of Kansas. Soon thereafter, Ryder was informed by the assignee that it had no intention of making further use of the leased equipment. Ryder thereupon cancelled the lease and instituted this suit alleging a breach. Its claim in three Counts sought (I) loss of profits for Central's failure to make use of the trucks; (II) Central's purchase of the leased equipment in accordance with the contractual provisions for its breach; and, (III) compensation for repairs made to the trucks by Ryder for Central's benefit.

On pretrial and trial, Central moved to dismiss Counts I and II for failure to state a claim, and objected to the admission of any extraneous evidence on the ground that "as a matter of law * * * the lease is a * * * complete and wholly integrated instrument and * * * the intention of the parties must * * * be determined from reading and interpreting the instrument by the Court;" and, that so construed, the lease "did not impose any obligation of use * * * on the part of the defendant."

Ryder also stood on the face of the contract, contending that by its terms, Central was required to use the leased equipment in the "normal and ordinary conduct" of its business. To make out its case, Ryder tendered in evidence the lease-contract, its letter of termination and proof of its damages resulting from the breach. Judging the lease on its face, the trial Court concluded that "Central was not required to do anything, really, unless they used the equipment * * * that there is no minimum use requirement or no use requirement in the contract;" and, that Ryder's claim on Counts I and II must, therefore, fall. The Court gave judgment for Ryder on Count III, and it is not now in dispute.

Since the dimensions of our lawsuit in its present posture are delineated by the four corners of the lease, its interpretation is a matter of law, wholly within the province of the Court. See: United States v. Nichel (10 CA), 243 F.2d 924. If, therefore, the trial Court's interpretation is correct, the directed verdict was proper. If, on the other hand, the contract is construed to obligate Central to use the equipment in the "normal and ordinary conduct" of its business, its admitted refusal to use the equipment constituted a breach, as a matter of law. In this event, the question of remedies and the extent thereof, is a matter for trial in the first instance.

Ryder contends that a covenant of reasonable use in the "normal and ordinary conduct" of Central's business is necessarily implied from the context of the whole lease, and is explicit in the language of paragraph 4-I.

We have said that "where a written agreement between contracting parties is seemingly complete, a court will not lightly imply an additional covenant enlarging its terms." Stern v. Dunlap Company (10 CA), 228 F.2d 939, 942. "We can only imply an obligation with respect to which the contract is silent when a consideration of the whole of its parts admits of no other reasonable construction." United States v. Nichel, supra, p. 927. See: Phillips Petroleum Co. v. McCormick (10 CA), 211 F.2d 361; Utex Exploration Co. v. Garwood (10 CA), 246 F.2d 547; and United States v. Easley (10 CA), 284 F.2d 518. "But if it is clear from all of the pertinent parts or provisions of the contract, taken together and considered in the light of the facts and circumstances surrounding the parties at the time of its execution, that the obligation in question was within the contemplation of the parties or was necessary to carry their intention into effect, it will be implied and enforced." Stern v. Dunlap Company, supra, p. 942. And see: Carter v. Certain-Teed Products Corp., 102 F. Supp.

280, remanded 200 F.2d 754; Wood v. Lucy, Lady Duff-Gordon, 118 N.E. 214; and Corbin on Contracts, Ch. 25, Vol. 3, Sec. 568.

The contract was elaborate and comprehensive with regard to the rights and duties imposed upon the respective parties. Each party owed the contract the duty of good faith performance, and impliedly covenanted not to interfere with the right of the other to the fruits of its bargain. See: Local 1912 International Association of Machinists v. United States Potash Co. (10 CA), 270 F.2d 496; and United Steelworkers of America v. New Park Mining Co. (10 CA), 273 F.2d 352; 3 Williston (Rev. Ed. 1936), §670. It is, of course, the Court's duty to construe the lease so as to effectuate the manifest intention of the parties—to give life and vitality to the language the parties have used to express their agreement.

Central contends and the trial Court was apparently of the view that the obligation in paragraph 4-I "to use and operate" the equipment in the "normal and ordinary conduct" of Central's business, related solely to the manner of use, and not the extent to which the equipment was to be used. Paragraph 4-A through K of the lease contains specifically enumerated covenants, each of which imposes an obligation upon the lessee with respect to the use and operation of the equipment. And, they do generally relate to the manner in which the refrigerated equipment is to be operated, and are primarily for the benefit and protection of the lessor. Thus, the lessee specifically agrees, inter alia, to operate the equipment by competent drivers; to avoid abusive handling; to reimburse the lessor for damages resulting from reckless or abusive operation; to periodically return each vehicle to the lessor's garage for inspection and maintenance to avoid interruption in service; to maintain adequate insurance coverage; to promptly notify and report to the lessor any accidents or collisions

involving the equipment; to pay any special license or ton mileage taxes; to use and operate the vehicles in compliance with all lawfully imposed regulations; and to indemnify and hold the lessor harmless against all forfeitures, seizures and penalties. These express covenants are obviously designed to cover every conceivable contingency with respect to the manner of operation of the equipment.

As we construe paragraph 4-I, however, it serves the additional purpose of obligating Central with respect to the extent of use. This contextual interpretation is in harmony with what appears to be the deliberate purpose of the parties not to specify a minimum mileage requirement, while at the same time imposing an obligation of reasonable use. The manifest purpose and design of the lease was the rental of this equipment for commercial use at a mileage rate. It was essentially a "use" lease, and reasonable use was undoubtedly contemplated. While the agreement was "noticeably silent" with respect to a minimum mileage use, it was explicit with respect to "normal and ordinary" use. In these circumstances, the intention of the parties and the contractual implication become synonymous. See: Brimmer v. Union Oil of California, 81 F.2d 437, 105 A.L.R. 454. That which is manifestly contemplated in fact is implied and enforced in law.

We construe the lease, as a matter of law, to provide for the "normal and ordinary" use in the conduct of Central's business, and this obligation ran with the equipment whether subleased or assigned. The case is accordingly REVERSED and REMANDED for further trial on the remedies provided in the lease for its breach. As to that, we express no opinion.

SETH, Circuit Judge, (dissenting):

I respectfully dissent from the conclusion reached by the majority that the lease agreement in paragraph 4-I

contains a provision governing the extent to which the trucks and trailers are to be used.

Paragraph 4-I, which appears among a series of specific requirements relating to the method of use, states that the lessee will use and operate the units in the normal and ordinary conduct of its business. The appellant urges that this is the provision prescribing the *extent* of use. This argument requires a reference to lessee's business for a measure or standard. This would not be difficult were it not for other lease provisions which contemplate that the units be used by any other firm or individual. Thus it is not lessee's business which is the measure, but that of all these other possible users also. The argument thus assumes that the parties agreed to use as a standard the quantity of use by these unknown assignees or sublessees. The lease provides a completely unrestricted power in the lessee to so sublease or "to assign this Agreement or any Interest therein." This right destroys the argument that lessee's business is the measure of use and leaves no standard or measure upon which a court can say the parties agreed. It appears that the lease was once assigned, the assignee went bankrupt, and it was assigned back. Thus the provision relating to assignment was used and recognized by the parties.

The same can of course be said as to the use of the same portion of paragraph 4-I as a standard for the *method* of use. Here again the method of use related to lessee's business by such a general provision, in the face of the free right to assign and sublease, has no meaning. The remaining provisions as to the methods of use are specific and would apply to any user.

Thus by assignment the method and extent of use can change without limit depending upon the nature of the assignee's or sublessee's business, and this leaves the court

without any measure or standard to determine damages in the event of a breach.

The lease is of some twelve pages in length with a five page schedule attached. It apparently was the result of negotiations and redrafting. There is in schedule A a form with a column for insertion of a fixed rental and one for a mileage rental. The fixed rental column contains zeros while the mileage rental is set on a sliding scale related to the amount of use. Thus in the portion of the lease where provisions as to the amount of use should appear there are none and in my opinion there are none elsewhere in the lease.

Both parties urge that the contract is not ambiguous, and urge construction of the terms it contains to reach a result. There is no contention advanced that a provision was inadvertently omitted. The action was brought on the express terms of the lease and so defended. Thus they say in effect that the contract is complete if properly construed, hence there is no room for implication by law to provide missing provisions.

I would affirm the judgment.

JUDGMENT

Nineteenth Day, January Term, Thursday,

January 28th, 1965.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable John C. Pickett and Honorable Oliver Seth, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Kansas and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby reversed, that this cause be and the same is hereby remanded to the said district court for further trial on the remedies provided in the lease for its breach, and that Ryder Truck Rental, Inc., appellant, have and recover of and from Central Packing Company, Inc., appellee, its costs herein and have execution therefor.

ORDER DENYING APPELLEE'S PETITION FOR REHEARING

Forty-Sixth Day, January Term, Wednesday,

March 17th, 1965.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable John C. Pickett and Honorable Oliver Seth, Circuit Judges.

This cause came on to be heard on the petition of appellee for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

[On March 29, 1965, the mandate of the United States Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States District Court for the District of Kansas.]

TRUCK LEASE AND SERVICE AGREEMENT

Dated at Kansas City, Missouri
This 25th day of January, 1960

THIS AGREEMENT is made between Ryder Truck Rental, Inc., whose address is 2444 Grand Avenue, Kansas City, Missouri, hereinafter called the OWNER, and Central Packing Company, Inc., whose address is Livestock Exchange Building, Kansas City, Missouri, hereinafter called the LESSEE.

1. CANCELLATION OF PRIOR AGREEMENTS:

It is expressly agreed that this Truck Lease and Service Agreement shall cancel and rescind any and all agreements, documents and instruments of every name and nature whatsoever dated prior to the date of this Truck Lease and Service Agreement between Ryder Truck Rental, Inc. and Central Packing Company, Inc.

2. PROPERTY COVERED AND TERM:

OWNER does hereby lease to LESSEE the motor vehicles described in SCHEDULE "A" OF TRUCK LEASE SERVICE AGREEMENT, attached hereto and made a part hereof. This Lease shall become effective with respect to each vehicle on the "delivery date" for that specific vehicle as set forth in Schedule "A", and shall continue under lease with respect to each said vehicle until terminated as hereinafter provided. The OWNER agrees and warrants that in order to secure to the LESSEE the continuous and uninterrupted use of the motor vehicles described herein during the term of and for the purposes described in this Truck Lease and Service Agreement, said motor vehicles are and during the term of this Lease and Agreement shall be mechan-

ically fit and properly equipped to safely and promptly transport fresh meats and perishable commodities and shall be maintained in clean, good and safe mechanical and operating condition. The OWNER further agrees and warrants that for the purpose of inducing the LESSEE to rely on the representations contained in this Truck Lease and Service Agreement, said motor vehicles are and during the term of this Truck Lease and Service Agreement shall be equipped and maintained in accordance with the requirements of all applicable laws, rules and regulations of State and Federal Authorities, including but not limited to the Interstate Commerce Commission, having jurisdiction over the operation of motor vehicles on the public highways. Where necessary to accomplish the performance of the obligations of the OWNER as provided in this Paragraph or to enable the LESSEE to perform its obligations as provided in Paragraph No. 4 I. (eye) herein, the OWNER authorizes the LESSEE to make or cause to be made such repairs to or on said motor vehicles as shall be required by a written order or directive of the Interstate Commerce Commission arising from or related to the enforcement of the Commission's Safety Regulations and in the event such repairs are made by the LESSEE, the provisions of Paragraph No. 3D herein shall apply.

3. OWNER AGREES:

A. To provide fuel, oil, lubricants, tires, tubes and all other operating supplies and accessories necessary for the proper and efficient operation of the vehicles described in Schedule "A" and the safe and prompt transportation of fresh meats and perishable commodities and to paint and letter the vehicles according to the specifications provided by the LESSEE. The OWNER further agrees to maintain the vehicles in sound and safe operat-

ing condition in accordance with the Safety Regulations prescribed by the Interstate Commerce Commission and in a manner which will provide to the LESSEE the safe and prompt transportation of fresh meats and perishable commodities, such maintenance to include exterior washing, polishing and servicing so that the vehicles shall present a neat appearance.

B. To reimburse the LESSEE for fuel, oil and or lubricants which the LESSEE purchases away from the OWNER's garage upon the receipt from the LESSEE of a receipted bill therefor.

C. To release the LESSEE from liability for damages from accidental collision or upset arising out of each accident to each leased vehicle in excess of the amount specified in Schedule "A".

D. If, during the term of this Truck Lease and Service Agreement, any of the Tractors or Semi-Trailers referred to herein should become disabled, or found by a Municipal, State or Federal Regulatory Agency to be unfit or unsafe for operation on the public highways, or subject to attachment or other process of law arising from or related to any alleged debt or obligation of the OWNER or involved in any alleged breach of the warranties provided herein, the LESSEE shall, at the expense of the OWNER, promptly notify the OWNER of the occurrence of said event and the OWNER agrees that the LESSEE may at the expense of the OWNER take such steps as are necessary to provide for continuous refrigeration and the following procedure shall become operative:

(1) In the event a vehicle becomes disabled or is found by a Municipal, State or Federal Regulatory Agency to be unfit or unsafe for operation on the public highways:

(a) The OWNER shall, upon the receipt of notice from the LESSEE, authorize or cause its agent to authorize the LESSEE to make or cause to be made such repairs as in the judgment of the LESSEE will restore the said vehicle to service in the shortest possible time.

(b) The OWNER shall within six (6) hours after the receipt of said notice from the LESSEE either substitute for said disabled, unfit or unsafe vehicle a vehicle of similar size and carrying capacity or begin actual repairs on said vehicle. In the event of the failure or refusal by the OWNER to furnish a substitute vehicle or to begin actual repairs within said six (6) hours, the LESSEE may at its election make or cause to be made such repairs as in its judgment will restore the said vehicle to service in the shortest possible time or hire a substitute vehicle and in the event of said substitution, the provisions of Paragraph No. 3D (1) (c) herein shall apply.

(c) In the event that the OWNER commences said repairs as provided in Paragraph No. 3D(1) (b) above and said repairs are not completed within ten (10) hours after said notice, the LESSEE may at its election make or cause to be made such repairs as in its judgment will restore the said vehicle to service in the shortest possible time or hire a substitute vehicle, and in the event of said substitution all the provisions of this Truck Lease and Service Agreement shall apply to said substitute vehicle and the OWNER agrees to reimburse the LESSEE for any additional rental over and above the amount of rental provided for herein with respect to said vehicle while said vehicle is out of service.

(2) In the event a vehicle becomes subject to the process of law arising from or related to any alleged

debt or obligation of the OWNER or involved in any breach of the warranties provided in Paragraph No. 7 herein, the LESSEE may at its election forthwith hire a substitute vehicle or take such other action as is necessary to promptly complete the delivery of the property of the LESSEE and in the event of said substitution or other action, the OWNER agrees to reimburse the LESSEE for all costs and expenses incurred by the LESSEE in completing the delivery of its property. In the event that the legal action involving said vehicle is not terminated and all liens or attachments on said vehicle are not fully and legally discharged within three days, the provisions of this Lease and Agreement with respect to said vehicle shall then and thereupon terminate and the OWNER shall forthwith pay to the LESSEE the additional sum of Five Hundred Dollars ($500.00) as liquidated damages in payment of all claims by the LESSEE arising from and related to said legal action or the removal of said vehicle from the service of the LESSEE.

and the OWNER hereby authorizes the LESSEE to deduct the cost of said repairs, refrigerants, rental or substitute vehicles and expenses related thereto from any rental then payable or to become payable to the OWNER, provided that vouchers for said repairs, refrigerants and expenses are furnished to the OWNER at the time said deduction is made. The OWNER and the LESSEE specifically and mutually agree that time is of the essence with respect to all the terms and provisions of Paragraph No. 3D herein.

E. To release LESSEE from liability for damage to leased vehicles resulting from fire or theft.

F. To provide at its own cost, beyond local motor vehicle licenses required by the State of Missouri and the City of Kansas City, Missouri at current fees and to pay all personal property taxes assessed on each vehicle.

G. To provide storage for each vehicle at 2444 Grand Avenue, Kansas City, Missouri or other mutually agreeable locations.

4. LESSEE AGREES:

A. To lease the vehicles described in Schedule "A" and to pay OWNER all charges provided herein within seven days of receipt of invoice from OWNER. Payments to be made to 2444 Grand Avenue, Kansas City, Missouri.

B. To cause each motor vehicle to be operated by a competent, properly licensed driver who shall be the agent of the LESSEE and subject to its control, direction and supervision. To pay all wages and expenses of said driver and, subject to existing agreements between the LESSEE and a labor union, upon receipt of a written complaint from the OWNER specifying reckless or abusive handling of the vehicle or other incompetence by any driver to immediately remove such driver and substitute a competent driver.

C. To endeavor to return each vehicle to OWNER's garage for a minimum of eight (8) hours in each and every week for inspection and adjustments to eliminate, insofar as possible, interruptions to LESSEE's service.

D. Subject to the terms and provisions of Paragraph No. 3D herein, not to cause or permit LESSEE's drivers, employees or agents to make or authorize repairs or adjustments to vehicles or tamper with governors but in all cases to notify the OWNER by the speediest means of communication giving a description of the nature of the defect or failure and location of the vehicle and abide by the OWNER's directions concerning emergency repair service.

E. To reimburse the OWNER in full for damages resulting from reckless or abusive operation of the vehicles off a public highway or overloading beyond the load capacity shown in Schedule "A" attached hereto.

F. To procure and maintain policies of insurance, with both the OWNER and the LESSEE as named assureds, covering the vehicles described herein, during such time as said vehicles are leased to and operated by the LESSEE, against third party claims for death, personal injury or property damage, in not less than the following amounts:

Bodily Injury	$250,000.00	per person
Bodily Injury	$500,000.00	per accident
Property Damage	$ 50,000.00	per accident

and to deliver to the OWNER appropriate Certificates of insurance certifying the insurance coverage described in this Paragraph and that said insurance shall not be cancelled without ten (10) days written notice to the OWNER.

G. Except as otherwise specifically provided herein and except when any of the motor vehicle equipment described herein is in the custody or control of the OWNER, to release and hold the OWNER harmless for loss of or damage to cargo or other property belonging to or in the custody of the LESSEE and for injury to employees or passengers of the LESSEE or for damage to their property.

H. To notify the OWNER in writing as soon as possible of any accidents or collisions involving the leased vehicles and to cause the driver to make a detailed report in person at the OWNER's office as soon as practicable and to promptly render all other reasonable as-

sistance to the OWNER as required in its investigation and defense of all claims and suits.

I. That during the term of this Truck Lease and Service Agreement it will use and operate the motor vehicle equipment described herein in the normal and ordinary conduct of its business including, but not limited to, renting, leasing or subleasing said vehicles to others, subject to the provisions of Paragraph No. 5D herein. The LESSEE, recognizing and accepting its responsibility to equip, maintain and inspect said motor vehicle equipment in compliance with the effective Safety Regulations prescribed by State and Federal Authorities, including but not limited to the Interstate Commerce Commission, having jurisdiction over the operation of motor vehicles on the public highways expressly relies on the warranty by the OWNER in Paragraph No. 2 herein that said motor vehicle equipment is and during the term of this Truck Lease and Service Agreement shall be so equipped and maintained and agrees that said motor vehicle equipment shall be inspected as required by said Safety Regulations by its agents or employees.

J. To pay any special license or tax required by the business of the LESSEE except as specifically provided in Paragraph No. 3F herein and to be responsible for any highway or bridge tolls, mileage taxes or ton mileage taxes which may result from the operation of these vehicles.

K. To use and operate the motor vehicles described herein in compliance with the lawful regulations of State and Federal Agencies having jurisdiction over the operation of motor vehicles on the public highways and to indemnify and to hold the OWNER harmless against any fines, forfeitures, seizures and penalties arising out of any such violation resulting from the use and operation of the leased vehicles by LESSEE.

5. IT IS MUTUALLY AGREED:

A. Mileage shall be determined from speedometer readings. If the speedometer fails to function the mileage for the period in which the failure occurred shall be estimated by the amount of fuel consumed and the miles per gallon record of OWNER averaged for the previous six months.

B. The motor vehicles described in this Lease and Agreement shall not be operated with weight in excess of the licensed capacity of said vehicles.

C. Acceptance of a vehicle in service constitutes an acknowledgment that the vehicle complies with LESSEE's specifications provided, however, that such acceptance by the LESSEE shall not be deemed as any waiver or modification of any of the OWNER's obligations under the provisions of Paragraph No. 2 and Paragraph No. 3 of this Truck Lease and Service Agreement and provided further that any structural alteration, special equipment other than is or shall be required by State or Federal Safety Regulations or material alteration in painting, lettering or art work thereafter required by LESSEE shall be made at the expense of the LESSEE. It is agreed that in the event that an order or directive of a State or Federal Regulatory Agency shall require the installation of any additional safety equipment on any of the vehicles leased by the LESSEE under and during ther term of this Lease and Agreement, said safety equipment shall be promptly obtained and installed by the OWNER, subject to the following conditions:

(1) Where said safety equipment costs the OWNER fifty Dollars ($50.00) or less for each vehicle, said safety equipment shall be purchased, paid for and installed by the OWNER.

(2) Where said safety equipment costs the OWNER more than Fifty Dollars ($50.00) for each vehicle, said safety equipment shall be purchased by the OWNER and the total cost of the purchase price and the cost of installation shall be divided equally between the OWNER and the LESSEE.

D. This Lease and Agreement shall be binding on the Parties hereto, their successors, legal representatives and assigns. The LESSEE shall, upon notice to the OWNER, have the right to sublease any of the vehicles leased hereunder and to assign this Agreement or any interest therein, provided, however, that in the event of such sublease or assignment the LESSEE shall remain liable for the performance of all of its obligations hereunder and for damage to the interior of a refrigerated vehicle arising from or related to the transporation of other than perishable commodities.

E. The terms of this Lease and Agreement shall not be altered or amended or construed as altered or amended by any verbal agreement or informal writing, nor by failure to insist upon performance or failure to exercise any right or privilege, but alteration, amendment or addition shall be accomplished only by execution of endorsement hereon or amendment hereto duly executed by both Parties.

F. Recognizing that the rental for the lease of the motor vehicles described herein is exclusive of any sales or use taxes which might be imposed after the date of the execution of this Lease and Agreement, the LESSEE agrees to pay in addition to the rent specified, the amount of such future imposed sales or use taxes and any other new or additional taxes or any increase in taxes, license and registration fees effective after the effective date of this Lease and Agreement applicable to the use of the

motor vehicles leased to and operated by the LESSEE under and during the term of this Lease and Agreement.

6. EFFECTIVE DATE AND TERMINATION PRIVILEGES:

A. This Truck Lease and Service Agreement shall be retroactive to and shall become effective on July 10, 1959 and unless sooner cancelled and terminated as provided herein shall remain in full force and effect until January 10, 1966 and shall then and thereupon terminate without notice by either Party to the other.

B. This Truck Lease and Service Agreement may be terminated and cancelled by the OWNER upon written notice to the LESSEE one hundred and fifty (150) days prior to the first and any subsequent anniversary date and in the event of such termination by the OWNER, the LESSEE shall have the right to purchase all or any of the vehicles then covered by this Lease and Agreement for the sum of the "original value" less the total accrued "weekly depreciation" for each such vehicle in accordance with the provisions of Schedule "A".

C. Upon written notice to the OWNER sixty (60) days prior to the first, second, third, fourth, fifth or sixth anniversary date of the effective date of this Lease and Agreement as provided in Paragraph No. 6A herein, the LESSEE may terminate this Lease and Agreement with respect to all or any of the vehicles then covered by this Lease and Agreement and in the event of such termination the OWNER and the LESSEE agree as follows:

(1) Upon termination by the LESSEE on the first, second or third anniversary, the LESSEE shall purchase the tractors and trailers with respect to which this Lease and Agreement has been terminated, paying to the OWNER the sum of the

"original value" less the total accrued "weekly depreciation" for each such vehicle in accordance with the provisions of Schedule "A" plus the pro rata amount of unexpired license fees and applicable taxes for each such vehicle. In the event of such purchase, the LESSEE shall have the option to purchase the tires on said vehicles at a price which is mutually acceptable to the OWNER and to the LESSEE.

(2) Upon termination by the LESSEE on the fourth, fifth or sixth anniversary, the LESSEE may terminate this Lease and Agreement with respect to as many tractors as it chooses without any obligation to purchase any of said tractors, whereupon the LESSEE, at its option, may subject to all the terms and conditions of this Lease and Agreement and the right by the LESSEE to terminate on any subsequent anniversary as specifically provided herein, continue this Lease and Agreement with respect to the remaining number of tractors and an equal number of trailers. With respect to such trailers in excess of the number of tractors retained by the LESSEE under this Lease and Agreement as provided in Paragraph No. 6C(2) herein, the LESSEE may at its option

(a) Purchase said trailers, paying to the OWNER the price computed in accordance with the provisions of Paragraph No. 6C(1) herein, or

(b) Continue, subject to all of the terms and conditions of this Lease and Agreement and the right of the LESSEE to terminate on any subsequent anniversary as specifically provided herein, to lease said trailers for the remainder of the term of this Lease and Agreement at a rental of Two Hundred Forty-Seven Dollars ($247.00) per month, subject to the following conditions:

(i) The OWNER agrees to release and hold the LESSEE harmless from liability for

damage to leased vehicles resulting from accidental collision or upset in excess of Five Hundred Dollars ($500.00) arising out of each accident to each leased vehicle.

(ii) The LESSEE shall pay for all operating expenses, taxes and fees and shall provide and pay for all trailer and refrigeration maintenance, tires and license plates in connection with the operation of said trailers.

(iii) All of the provisions of this Lease and Agreement not inconsistent with the provisions of Paragraphs Nos. 6C(2)(b)(i) and 6C(2)(b)(ii) shall apply with respect to the lease of said excess trailers.

provided, however, that the right of the LESSEE, pursuant to Paragraph No. 6C herein to terminate this Lease and Agreement with respect to tractors sixty (60) days prior to the fourth anniversary date of the effective date of this Lease and Agreement shall not commence until

(aa) the International Diesel Tractor No. B800 described in Schedule "A" and any replacement or substitute vehicle has been operated for a cumulative total of 400,000 miles

(bb) each of the Mack Tractors Nos. B801 through B829 described in Schedule "A" and any replacement or substitute vehicles has been operated for a cumulative total of 260,000 miles

and if such events occur after said fourth anniversary date, the right of the LESSEE to terminate with respect to each of the tractors covered by Subparagraphs (aa) and (bb) immediately above on said fourth anniversary date shall be extended to the date on which said mileage shall have accrued.

D. This Lease and Agreement shall terminate automatically and without notice at the election of the OWNER or the LESSEE if the LESSEE or the OWNER shall (1) become insolvent, or (2) file a voluntary petition in bankruptcy, or (3) make an assignment for the benefit of creditors, or (4) shall be adjudicated a bankrupt or (5) if a receiver be appointed for the business of the OWNER or the LESSEE.

E. Time is of the essence of this Lease and Agreement and in the event either the OWNER or the LESSEE substantially breaches or is in default of any material provisions of this Lease and Agreement the Party not in default may, without notice to the other Party, refuse to comply with the terms of this Lease and Agreement until such breach or default is cured, without such refusal being deemed an act of cancellation and without prejudice to other remedies available to either Party. If the breach or default shall continue for seven (7) days after written notice thereof shall have been mailed to the Party in default, the Party not in default may at its election cancel and terminate this Lease and Agreement immediately upon the mailing of written notice of such cancellation and termination to the other Party. In the event that breach or default by the LESSEE is the cause of election by the OWNER to cancel and terminate this Lease and Agreement, the LESSEE agrees to purchase the vehicles then covered by this Lease and Agreement, paying to the OWNER the price computed in accordance with Paragraph No. 6C(1) herein and if the LESSEE shall fail to pay the said purchase price the OWNER may sell the vehicles at public sale and the LESSEE shall be liable to the OWNER for the difference between the said purchase price and the amount realized at such sale. In the event that breach or default by the OWNER is the cause of election by the LESSEE to cancel and terminate this Lease

and Agreement, the LESSEE shall specifically have no obligation to purchase any of the vehicles then covered by this Lease and Agreement and the LESSEE shall specifically have the right to purchase all or any of the vehicles then covered by this Lease and Agreement for the sum of the "original value" less the total accrued "weekly depreciation" for each such vehicle in accordance with the provisions of Schedule "A". In the event of election by the LESSEE to cancel and terminate this Lease and Agreement because of breach or default by the OWNER as provided in Paragraph No. 6D herein, the OWNER shall be liable to the LESSEE for damages resulting from said breach or default.

7. The OWNER warrants that it has full right to lease to the LESSEE the motor vehicle equipment described in Schedule "A" in accordance with the terms and provisions of this Lease and Agreement, that it is not a Carrier as defined in Part Two of the Interstate Commerce Act and covenants and agrees that the LESSEE, paying the rent and performing each and every covenant herein set forth on its part to be performed, shall have, hold and enjoy the continuous and uninterrupted use, possession and right to possession of said motor vehicle equipment during the full term of this Agreement. Subject to the provisions of Paragraph No. 3D herein, the OWNER may finance the property leased hereunder, or any part thereof, and in that connection may, as security, give the lender an installment sales instrument or mortgage covering such property, provided, however, that before executing said installment sales instrument or mortgage the OWNER agrees to obtain and deliver to the LESSEE the written assent to this Lease and Agreement by the holder of any such security interest in any of the vehicles leased to the LESSEE under this Lease and Agreement.

8. All notices provided for herein shall be in writing and directed to the OWNER and to the LESSEE, as the case may be, at their respective addresses as shown on Page No. 1 of this Lease and Agreement.

IN WITNESS WHEREOF, each of the Parties hereto has caused these presents to be duly executed the day and year first above written by an officer duly authorized and their respective corporate seals hereto affixed.

Ryder Truck Rental, Inc.
(Owner)
By /s/ Arthur A. Rosewall
Its President - Duly Authorized

Central Packing Company, Inc.
(Lessee)
By /s/ Eli Jacobson
Its Treasurer - Duly Authorized

Signed, Sealed and Delivered in the Presence of:

/s/ Castle W. Jordan
/s/ Adeline Call

SCHEDULE "A" OF TRUCK LEASE AGREEMENT

Add to Agreement:
~~Remove From Agreement:~~ ~~(Strike One)~~

Truck No.	Date of Delivery or Removal	Year & Make	Type	Missouri License	Chassis No.	Motor No.	Lessee's Collision Liability	Original Value *	Weekly Depreciation	Flood Rental Charge Per Wk.	Mileage Rate Per Mile
B 800	7-10-59	IHC	Tractor	Over 60 M	E 5170 H	NH220-235756	$500	$17870.00	$68.73	-0-	•••
B 1800	7-10-59	Fruehauf	Trailer		AV-328048			$15004.25	$32.46	-0-	
B 801	9-19-59	Mack	Tractor	60,010	28423	END673-418-71	$500	$12675.00	$40.63	-0-	••
B 1801	9-19-59	Fruehauf	Trailer		AV-328052			$14828.00	$32.08	-0-	
B 802	9-19-59	Mack	Tractor	60,010	28424	END673-419-10	$500	$12675.00	$40.63	-0-	••
B 1802	9-19-59	Fruehauf	Trailer		AV-328053			$14828.00	$32.08	-0-	
B 803	9-19-59	Mack	Tractor	60,010	28425	END673-419-67	$500	$12675.00	$40.63	-0-	••
B 1803	9-19-59	Fruehauf	Trailer		AV-328054			$14828.00	$32.08	-0-	
B 804	9-19-59	Mack	Tractor	60,010	28426	END673-420-37	$500	$12675.00	$40.63	-0-	••
B 1804	9-19-59	Fruehauf	Trailer		AV-328055			$14828.00	$32.08	-0-	
B 805	9-19-59	Mack	Tractor	60,010	28427	END673-420-40	$500	$12675.00	$40.63	-0-	••
B 1805	9-19-59	Fruehauf	Trailer		AV-328056			$14828.00	$32.08	-0-	

* ORIGINAL VALUE DOES NOT INCLUDE TIRES.

This Agreement, dated January 25, 1960, will be effective as to each vehicle as provided in the column above entitled "Date of Delivery or Removal". By mutual agreement between the parties hereto, it is agreed that this "Schedule A" is hereby made a part of that certain Truck Lease Agreement between the parties hereto dated January 25, 1960, effective as of July 10, 1959.

~~This Agreement will be effective as to each vehicle on the date it is ready for LESSEE'S service and LESSEE agrees that it will accept service when same is ready. By mutual agreement between the parties hereto entered into this _____ day of _____, 19__, it is agreed that this "Schedule A" is hereby made a part of that certain Truck Lease Agreement between the parties hereto dated the _____ day of _____, 19__.~~

Signed:
RYDER TRUCK RENTAL, INC.
Owner

By Arthur A. Rosewall
Arthur A. Rosewall
Its President - Duly Authorized

9-53

Signed:
CENTRAL PACKING COMPANY, INC.
Lessee

By Eli Jacobson
Eli Jacobson
Its Treasurer - Duly Authorized

A27

SCHEDULE "A" OF TRUCK LEASE AGREEMENT

Add to Agreement:
~~Remove From Agreement: (Strike One)~~

Truck No.	Date of Delivery or Removal	Year & Make	Type	Insurance Limits License	Chassis No.	Motor No.	Lessee's Collision Liability	Original Value *	Weekly Depreciation	Fixed Rental Charges Per Wk.	Mileage Rate Per Mile
B 806	9-19-59	Mack	Tractor	60,010	28428	END673-418-69	$500	$12675.00	$40.63	-0-	**
B 1806	9-19-59	Fruehauf	Trailer		AV-328057			$14828.00	$32.08	-0-	
B 807	9-19-59	Mack	Tractor	60,010	28429	END673-418-72	$500	$12675.00	$40.63	-0-	**
B 1807	9-19-59	Fruehauf	Trailer		AV-328058			$14828.00	$32.08	-0-	
B 808	9-19-59	Mack	Tractor	60,010	28430	END673-421-48	$500	$12675.00	$40.63	-0-	**
B 1808	9-19-59	Fruehauf	Trailer		AV-328059			$14828.00	$32.08	-0-	
B 809	9-19-59	Mack	Tractor	60,010	28431	END673-418-70	$500	$12675.00	$40.63	-0-	**
B 1809	9-19-59	Fruehauf	Trailer		AV-328060			$14828.00	$32.08	-0-	
B 810	9-19-59	Mack	Tractor	60,010	28432	END673-418-67	$500	$12675.00	$40.63	-0-	**
B 1810	9-19-59	Fruehauf	Trailer		AV-328061			$14828.00	$32.08	-0-	
B 811	9-19-59	Mack	Tractor	60,010	28433	END673-420-100	$500	$12675.00	$40.63	-0-	**
B 1811	9-19-59	Fruehauf	Trailer		AV-328062			$14828.00	$32.08	-0-	

* ORIGINAL VALUE DOES NOT INCLUDE TIRES.

This Agreement, dated January 25, 1960, will be effective as to each vehicle as provided in the column above entitled "Date of Delivery or Removal". By mutual agreement between the parties hereto, it is agreed that this "Schedule A" is hereby made a part of that certain Truck Lease Agreement between the parties hereto dated January 25, 1960, effective as of July 10, 1959.

~~This Agreement will be effective as to each vehicle on the date it is ready for LESSEE'S service and LESSEE agrees that it will accept service when same is ready. By mutual agreement between the parties hereto entered into this _____ day of _____, 19__, it is agreed that this "Schedule A" is hereby made a part of that certain Truck Lease Agreement between the parties hereto dated the _____ day of _____, 19____.~~

Signed:
RYDER TRUCK RENTAL, INC.
Owner
By Arthur A. Rosewall
9-53 Arthur A. Rosewall
Its President - Duly Authorized

Signed:
CENTRAL PACKING COMPANY, INC.
Lessee
By Eli Jacobson
Eli Jacobson
Its Treasurer - Duly Authorized

A28

SCHEDULE "A" OF TRUCK LEASE AGREEMENT

Add to Agreement:
~~Remove From Agreement: (Strike One)~~

Truck No.	Date of Delivery or Removal	Year & Make	Type	Missouri License	Chassis No.	Motor No.	Lessee's Collision Liability	Original Value *	Weekly Depreciation	Fixed Rental Charge Per Wk.	Mileage Rate Per Mile
B 812	9-19-59	Mack	Tractor	60,010	28434	END673-420-96	$500	$12675.00	$40.63	-0-	**
B 1812	9-19-59	Fruehauf	Trailer		AV-328063			$14828.00	$32.08	-0-	
B 813	9-19-59	Mack	Tractor	60,010	28435	END673-422-28	$500	$12675.00	$40.63	-0-	**
B 1813	9-19-59	Fruehauf	Trailer		AV-328064			$14828.00	$32.08	-0-	
B 814	9-19-59	Mack	Tractor	60,010	28436	END673-420-91	$500	$12675.00	$40.63	-0-	**
B 1814	9-19-59	Fruehauf	Trailer		AV-328065			$14828.00	$32.08	-0-	
B 815	9-19-59	Mack	Tractor	60,010	28437	END673-420-33	$500	$12675.00	$40.63	-0-	**
B 1815	9-19-59	Fruehauf	Trailer		AV-328066			$14828.00	$32.08	-0-	
B 816	9-19-59	Mack	Tractor	60,010	28438	END673-422-21	$500	$12675.00	$40.63	-0-	**
B 1816	9-19-59	Fruehauf	Trailer		AV-328067			$14828.00	$32.08	-0-	
B 817	9-19-59	Mack	Tractor	60,010	28439	END673-421-53	$500	$12675.00	$40.63	-0-	**
B 1817	9-19-59	Fruehauf	Trailer		AV-328068			$14828.00	$32.08	-0-	

* ORIGINAL VALUE DOES NOT INCLUDE TIRES.

This Agreement, dated January 25, 1960, will be effective as to each vehicle as provided in the column above entitled "Date of Delivery or Removal". By mutual agreement between the parties hereto, it is agreed that this Schedule A is hereby made a part of that certain Truck Lease Agreement between the parties hereto dated January 25, 1960, effective as of July 10, 1959.

~~This Agreement will be effective as to each vehicle on the date it is ready for LESSEE'S service and LESSEE agrees that it will accept service when same is ready. By mutual agreement between the parties hereto entered into this ..... day of ....., 19 ....., it is agreed that this "Schedule A" is hereby made a part of that certain Truck Lease Agreement between the parties hereto dated the ..... day of ....., 19 .....~~

Signed:
RYDER TRUCK RENTAL, INC.
Owner
By Arthur A. Rosewall
Arthur A. Rosewall
Its President - Duly Authorized

9-53

Signed:
CENTRAL PACKING COMPANY, INC.
Lessee
By Eli Jacobson
Eli Jacobson
Its Treasurer - Duly Authorized

SCHEDULE "A" OF TRUCK LEASE AGREEMENT

Add to Agreement:
~~Remove From Agreement: (Strike One)~~

Truck No.	Date of Delivery or Removal	Year & Make	Type	Missouri Licensed Gross Limits License	Chassis No.	Motor No.	Lessee's Collision Liability	* Original Value	Weekly Depreciation	Fixed Rental Charge Per Wk.	Mileage Rate Per Mile
B 818	9-19-59	Mack	Tractor	60,010	28440	END673-421-52	$500	$12675.00	$40.63	-0-	**
B 1818	9-19-59	Fruehauf	Trailer		AV-328069			$14828.00	$32.08	-0-	
B 819	9-19-59	Mack	Tractor	60,010	28441	END673-421-54	$500	$12675.00	$40.63	-0-	**
B 1819	9-19-59	Fruehauf	Trailer		AV-328070			$14828.00	$32.08	-0-	
B 820	10-1-59	Mack	Tractor	60,010	28442	END673-421-56	$500	$12675.00	$40.63	-0-	**
B 1820	10-1-59	Fruehauf	Trailer		AV-328071			$14828.00	$32.08	-0-	
B 821	10-1-59	Mack	Tractor	60,010	28443	END673-421-55	$500	$12675.00	$40.63	-0-	**
B 1821	10-1-59	Fruehauf	Trailer		AV-328072			$14828.00	$32.08	-0-	
B 822	10-1-59	Mack	Tractor	60,010	28444	END673-422-27	$500	$12675.00	$40.63	-0-	**
B 1822	10-1-59	Fruehauf	Trailer		AV-328073			$14828.00	$32.08	-0-	
B 823	10-10-59	Mack	Tractor	60,010	28445	END673-423-50	$500	$12675.00	$40.63	-0-	**
B 1823	10-10-59	Fruehauf	Trailer		AV-328074			$14828.00	$32.08	-0-	

* ORIGINAL VALUE DOES NOT INCLUDE TIRES.

This Agreement, dated January 25, 1960, will be effective as to each vehicle as provided in the column above entitled 'Date of Delivery or Removal'. By mutual agreement between the parties hereto, it is agreed that this "Schedule A" is hereby made a part of that certain Truck Lease Agreement between the parties hereto dated January 25, 1960, effective as of July 10, 1959.

~~This Agreement will be effective as to each vehicle on the date it is ready for LESSEE'S service and LESSEE agrees that it will accept service when same is ready. By mutual agreement between the parties hereto entered into this _____ day of _____, 19____, it is agreed that this "Schedule A" is hereby made a part of that certain Truck Lease Agreement between the parties hereto dated the _____ day of _____, 19____.~~

Signed:
RYDER TRUCK RENTAL, INC.
Owner
By Arthur A. Rosewall
9-53
Arthur A. Rosewall
Its President - Duly Authorized

Signed:
CENTRAL PACKING COMPANY, INC.
Lessee
By Ell Jacobson
Ell Jacobson
Its Treasurer - Duly Authorized

A30

SCHEDULE "A" OF TRUCK LEASE AGREEMENT

Add to Agreement:
Remove From Agreement: (Strike One)

Missouri

Truck No.	Date of Delivery or Removal	Year & Make	Type	Licensing Data	Chassis No.	Motor No.	Lessee's Collision Liability	*Original Value	Weekly Depreciation	Fixed Rental Charge Per Wk.	Mileage Rate Per Mile
B 824	10-1-59	Mack	Tractor	60,010	28446	END673-423-51	$500	$12675.00	$40.63	-0-	**
B 1824	10-1-59	Fruehauf	Trailer		AV-328075			$14828.00	$32.08	-0-	
B 825	10-3-59	Mack	Tractor	60,010	28447	END673-423-29	$500	$12675.00	$40.63	-0-	**
B 1825	10-3-59	Fruehauf	Trailer		AV-328076			$14828.00	$32.08	-0-	
B 826	10-7-59	Mack	Tractor	60,010	28448	END673-422-72	$500	$12675.00	$40.63	-0-	**
B 1826	10-7-59	Fruehauf	Trailer		AV-328077			$14828.00	$32.08	-0-	
B 827	10-14-59	Mack	Tractor	60,010	28449	END673-422-63	$500	$12675.00	$40.63	-0-	**
B 1827	10-14-59	Fruehauf	Trailer		AV-328078			$14828.00	$32.08	-0-	
B 828	10-12-59	Mack	Tractor	60,010	28450	END673-423-49	$500	$12675.00	$40.63	-0-	**
B 1828	10-12-59	Fruehauf	Trailer		AV-328079			$14828.00	$32.08	-0-	
B 829	10-1-59	Mack	Tractor	60,010	28451	END673-424-85	$500	$12675.00	$40.63	-0-	**
B 1829	10-1-59	Fruehauf	Trailer		AV-328080			$14828.00	$32.08	-0-	

* ORIGINAL VALUE DOES NOT INCLUDE TIRES.

This Agreement, dated January 25, 1960, will be effective as to each vehicle as provided in the column above entitled Date of Delivery or Removal . By mutual agreement between the parties hereto, it is agreed that this Schedule A is hereby made a part of that certain Truck Lease Agreement between the parties hereto dated January 25, 1960, effective as of July 10, 1959.

~~This Agreement will be effective as to each vehicle on the date it is ready for LESSEE'S service and LESSEE agrees that it will accept service when same is ready. By mutual agreement between the parties hereto entered into this ..... day of ....., 19..., it is agreed that this "Schedule A" is hereby made a part of that certain Truck Lease Agreement between the parties hereto dated the ..... day of ....., 19.....~~

Signed:
RYDER TRUCK RENTAL, INC.
Owner
By Arthur A. Rosewall
Arthur A. Rosewall
Its President - Duly Authorized

Signed:
CENTRAL PACKING COMPANY, INC.
By E.H. Jacobson
E.H. Jacobson
Its Treasurer - Duly Authorized

9-53

A31

EQUIPMENT RATES

*** DCOF-405 International Diesel Tractor with 40 foot tandem axle Fruehauf trailer at .219¢ per mile for the first 144,000 miles per contract year, and all miles in excess of 144,000 miles, per contract year at .183¢ per mile.

** B-61-T Mack Diesel Tractor with 35 foot tandem axle Fruehauf trailer at .219¢ per mile for the first 90,000 miles per contract year, and all miles in excess of 90,000 miles, per contract year at .183¢ per mile.

TRAILER SPECIFICATIONS

Each 35 foot tandem axle Fruehauf trailer unit numbers B-1801 through B-1829 shall contain not less than 4 inches of fiberglass in its walls and ceilings and not less than 4 inches of styrofoam in its floor and rear doors and shall include a mechanical diesel-powered refrigeration unit capable of producing and maintaining an inside temperature of not more than 28° F.

Each 40 foot tandem axle Fruehauf trailer unit number B-1800 shall contain not less than 4 inches of fiberglass in its walls and ceilings and not less than 4 inches of styrofoam in its floor and rear doors and shall include a mechanical propane-powered refrigeration unit capable of producing and maintaining an inside temperature of not more than 28° F.

RYDER TRUCK RENTAL, INC.
BOARD OF DIRECTORS
JANUARY 25, 1960

Mr. Rosewall, Chairman, called attention to the fact that counsel for the corporation had been negotiating with counsel for Central Packing Co., Inc., of Kansas City, Missouri, with respect to resolving differences of opinion resulting over lease of tractors and trailers to Central Pack-

ing Co., Inc. A copy of a proposed Lease and Agreement was presented and discussed.

Whereupon, after motion duly made and seconded, it was unanimously

RESOLVED, that A. A. Rosewall, President, R. McClure, Vice President, E. M. Prussing, Vice President, and C. W. Jordan, Secretary, be and they hereby are authorized, directed and empowered, for, in the name of, and on behalf of this corporation to enter into a Lease and Agreement with appropriate Schedule A in substantially the form and content presented by C. W. Jordan, General Counsel, to this meeting and execution thereof shall be conclusive upon this corporation.

I, Arnold B. Braun, Assistant Secretary of Ryder Truck Rental, Inc., a Florida corporation, do hereby certify that the foregoing resolution is a true and correct copy of a resolution adopted at a special meeting of the Board of Directors of said Company held on the 25th day of January, 1960, at Miami, Florida, and that the same are still in full force and effect.

WITNESS my signature and the seal of the corporation, this 26th day of January, 1960.

/s/ Arnold B. Braun,
Arnold B. Braun,
(Seal) Assistant Secretary

THIS IS TO CERTIFY:

That at a special meeting of the Directors of Central Packing Company, Inc., held at the office of the corporation on January 25, 1960, at which meeting all the Directors were present and voting throughout, the following resolution was unanimously adopted:

VOTED: That the Treasurer of the corporation, namely Eli Jacobson, be and he hereby is authorized, acting and signing singly, to execute for and on behalf of the

corporation a Truck Lease and Service Agreement, dated January 25, 1960, between Ryder Truck Rental, Inc., of Kansas City, Missouri, and the corporation, together with Schedule "A" of said agrement between the same parties on the same date, which agreement and Schedule "A" were duly read at said meeting, and his execution thereof shall be the final and binding act of the corporation.

A true copy.
Attest:

/s/ Samuel Seder,
Samuel Seder,
Secretary

(Seal)

CENTRAL PACKING COMPANY, INC.

300 Central Avenue
DRexel 3400
Kansas City 18, Kansas
January 25, 1960

Ryder Truck Rental, Inc.
2444 Grand Avenue
Kansas City, Missouri
Gentlemen:

This will have reference to the Truck Lease and Service Agreement between Central Packing Company, Inc. and Ryder Truck Rental, Inc. dated this date.

No changes or modifications in the said Truck Lease and Service Agreement or Schedule "A" attached thereto shall be made without the express written authorization and approval by Mr. John Jacobson or the writer.

Very truly yours
Central Packing Company, Inc.
/s/ Eli Jacobson
Eli Jacobson
Treasurer

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FILED
AUG 2 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 248

CENTRAL PACKING COMPANY, INC.,
Petitioner,

vs.

RYDER TRUCK RENTAL, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

DOUGLAS STRIPP
RUSSELL W. BAKER
1500 Home Savings Building
Kansas City, Mo. 64106
ROBERT H. BINGHAM
Home State Bank Building
Kansas City, Kansas
Attorneys for Respondent.

Of Counsel:
WATSON, ESS, MARSHALL & ENGGAS,
STANLEY, SCHROEDER, WEEKS, THOMAS & LYSAUGHT.

R. L. MERRIHALL, INC., 1103 Oak Street, Kansas City, Mo. 64106, HArrison 1-3070

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

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CENTRAL PACKING COMPANY, INC.,
Petitioner,

vs.

RYDER TRUCK RENTAL, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

I.

This action was brought for breach of contract. The Court of Appeals reversed the trial court and held, as a matter of law, that Petitioner had breached the contract. The case was remanded for further trial on the issue of remedy. Petitioner's first argument is simply that the Court of Appeals should have remanded the issues of breach and remedy. Petitioner's quarrel with the Court of Appeals is that breach should not have been determined as a matter of law.

The lease-contract in suit was dated January 25, 1960, but was retroactively effective to July 10, 1959 (Appendix pp. A10, A20). The first truck was placed in service under the lease on July 10, 1959 and the remaining twenty-nine trucks were placed in service during September and October, 1959 (Appendix pp. A27-A31). After the lease was signed on January 25, Petitioner continued to use and operate the trucks for about three weeks, when on February 13 it abruptly ceased using them and did not thereafter ever again use them (R. 97, 74). Petitioner continued shipments of its meat products at a rate of more than four million pounds per month, utilizing rail and motor common carrier, during February and March, 1960 (R. 72, 73). Respondent eventually learned that Petitioner had purportedly made an assignment of the lease, on April 1, 1960, to another meat packing company (R. 237). There is no claim that this assignee ever performed under the lease.

Petitioner now, for the first time, claims that by making *no use* of the trucks it could satisfy the use requirement which the lease imposed. The mere statement of this proposition is sufficient to demonstrate its faulty logic. Some irrelevant illustrations are hypothesized in support of this new theory (Pet. Br. p. 5). Moreover, the record affirmatively refutes these hypotheticals. The record shows that all of Petitioner's customers did not suddenly specify rail shipments, nor did Petitioner's business suddenly change so that no rolling equipment was required after February 13. Rather, truck common carrier shipments increased after February 13, 1960 (R. 73, 60, Interrog. 10(b)).

The Court of Appeals correctly construed the parties' contract as requiring use of the trucks. Since use was required and Petitioner did not use, the contract was

breached as a matter of law and the case was properly remanded for determination of remedy.

II.

Petitioner's second point is devoid of any reason for granting the Writ (Rule 19 of this Court). Petitioner makes no claim that its second point raises any constitutional issue.

The construction of this commercial contract between private parties is a question of local law. There is no federal law controlling such a determination. The pre-*Erie* decisions and admiralty decision cited by Petitioner (Pet. Br. 6-7) do not support review here. Every year the Courts of Appeals decide scores of "garden variety" contract cases involving no issues of federal law. One appeal should suffice for such matters, including this one.

Respondent respectfully urges that the Petition be denied.

DOUGLAS STRIPP
RUSSELL W. BAKER
1500 Home Savings Building
Kansas City, Mo. 64106
ROBERT H. BINGHAM
Home State Bank Building
Kansas City, Kansas
Attorneys for Respondent.

Of Counsel:
WATSON, ESS, MARSHALL & ENGGAS,
STANLEY, SCHROEDER, WEEKS, THOMAS & LYSAUGHT.

July 1965.

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OCTOBER TERM, 1965

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CENTRAL PACKING COMPANY, INC.,
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vs.

RYDER TRUCK RENTAL, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY OF PETITIONER TO BRIEF FOR RESPONDENT IN OPPOSITION

EDWARD A. SMITH
GEORGE SCHWEGLER, JR.
WAYNE F. CASKEY, JR.
1411 Commerce Trust Building
Kansas City, Missouri,

JAMES J. LYSAUGHT
604 Commercial National Bank Building
Kansas City, Kansas,
Attorneys for Petitioner.

Of Counsel:
SMITH, SCHWEGLER & SWARTZMAN,
McANANY, VAN CLEAVE & PHILLIPS.

E. L. MIELDENHALL, INC., 1108 Oak Street, Kansas City, Mo. 64106, HArrison 1-3030

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 248

CENTRAL PACKING COMPANY, INC.,
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Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY OF PETITIONER TO BRIEF FOR RESPONDENT IN OPPOSITION

I.

Petitioner contends, and contended in its Petition For Rehearing below, that the Court of Appeals usurped a jury's function and thereby committed error when it determined as a matter of law, and in the absence of any relevant finding of fact, that Petitioner breached the Lease in question. As a result, Petitioner was denied an opportunity to offer evidence showing that the normal and

ordinary conduct of its business did not require use of the leased equipment. Respondent's Brief contends, in effect, that Petitioner's position in this regard is illogical and that Petitioner's hypothetical fact situations illustrating the type of factual conditions which a jury might find are refuted by the Record. Neither of these contentions withstands analysis.

First, since Petitioner was obligated to use the equipment in the "normal and ordinary conduct of its business", a *fact* inquiry must be made to determine what that "normal and ordinary conduct" was. This inquiry must be concluded before any determination can be made as to breach. Such an inquiry has not been made, and if the majority opinion of the Tenth Circuit is allowed to stand, it will not be made, thus depriving Petitioner of its right to a jury trial on this fact issue. The determination of a breach of contract in this case is not an exercise in logic as Respondent urges, but a matter of factual determination which is the precise function of a jury.

Secondly, Respondent's contention that Petitioner's hypothetical fact situations as set forth in its Brief are unsupported by the Record misses the point entirely. The vital point is that *no* evidence was presented and *no* consideration was given by the Court of Appeals to the question of whether or not non-use of the equipment was justified in light of the normal and ordinary conduct of this Petitioner's business. Such evidence could not properly have been presented before the Court of Appeals any more than it can properly be presented or considered by this Court. Respondent's criticism of Petitioner's assumed illustrative fact situations merely serves to emphasize the legal necessity of presenting to a jury all available evidence on this issue before any determination can properly be made as to whether or not there was a breach of the lease.

II.

The decisions of this Court refute Respondent's contention that this Court has an inflexible rule that it will never, under any circumstances, review decisions of Courts of Appeals involving solely, or, as here, partially, questions of local law. Several factors which this Court has found significant in granting review of cases involving local law issues are present here. *First*, this Court has indicated that its rule against review of local law questions has greater force when District Court and Court of Appeals judgments exhibit a unanimity of opinion on a local law question. (See *Appalachian Power Co.* v. *American Institute of Certified Public Accountants*, 80 S. Ct. 16 (1959)). The case at bar exhibits less than unanimity, to say the least, for the District Judge and one Circuit Judge have agreed with Petitioner's position. *Secondly*, no local law of any particular state was cited by the Court of Appeals in its decision (See *Carroll* v. *United States*, 354 U.S. 394, 415 (1957) stating that "Since the Court of Appeals relied on precedents of general applicability . . . we do not consider that this case falls within the policy that ordinarily causes us to adhere to that court's view on local law matters.") *Finally*, it is Petitioner's contention and it was the position of the dissenting Circuit Judge, that, in view of the contractual provisions of, and the omissions from, the Lease in question, a covenant of mandatory use could not be reasonably implied in the Lease. Where the reasonableness of a court's interpretation has been called into question this Court has granted certiorari and considered local law questions. (See *United States* v. *Durham Lumber Co.*, 363 U.S. 522, 526 (1960)).

CONCLUSION

For the foregoing reasons it is submitted that this Court should review the jury trial question, which is clearly federal in nature, and that this Court should further review the question of the reasonableness of the contractual implication made by the Court of Appeals.

Respectfully submitted,

EDWARD A. SMITH
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WAYNE F. CASKEY, JR.
1411 Commerce Trust Building
Kansas City, Missouri,

JAMES J. LYSAUGHT
604 Commercial National Bank Building
Kansas City, Kansas,
Attorneys for Petitioner.

Of Counsel:
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MCANANY, VAN CLEAVE & PHILLIPS.